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No. 93-38

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1993

DEE FARMER, PETITIONER

v.

RICHARD HAAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion under 28 U.S.C. 1915(d) in not requesting an attorney to represent petitioner in her civil suit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 990 F.2d 319. The order of the district court (Pet. App. 8a-9a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1993. The petition for a writ of certiorari was filed on July 1, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a federal prison inmate who has been convicted of participating in an elaborate credit card fraud. She filed a *pro se* lawsuit in the United

States District Court for the Western District of Wisconsin seeking damages from three prison staff members, respondents herein. The lawsuit alleged that respondents had been deliberately indifferent to her need for medical and psychiatric treatment for transsexualism, in violation of the Cruel and Unusual Punishments Clause of the Eighth Amendment. Pet. App. 1a-2a.

The district court granted respondents' motion for summary judgment on the ground that the Bureau of Prisons had provided petitioner with psychotherapy. Petitioner appealed, and the court of appeals reversed in an unpublished order and remanded the case for trial. Pet. App. 1a.

2. In April 1991, one week before trial, petitioner filed a motion for appointment of counsel pursuant to 28 U.S.C. 1915(d). Relying on the multi-factor test of *Maclin* v. *Freake*, 650 F.2d 885 (7th Cir. 1981), the district court denied the motion. Pet. App. 8a-9a. The court explained that the "case is neither factually difficult nor legally complex" and that petitioner had "represented herself throughout these proceedings and is capable to continue in further proceedings in this court." *Id.* at 8a.

At trial, the issue was whether petitioner had been denied any treatment for her condition. Petitioner claimed that respondents had refused her requests for medical and psychiatric treatment, and introduced into evidence written requests for treatment that had been found in respondents' files. Respondents introduced evidence to show that the purported written requests for treatment were forgeries and that petitioner had been in a position to place forged documents in her file. Gov't C.A. Br. 7; Pet. App. 3a.

The jury returned a verdict in favor of respondents. *Id.* at 1a-2a.

3. Petitioner appealed, claiming that the district court erred in denying her motion for appointment of counsel under 28 U.S.C. 1915(d). The court of appeals affirmed. Pet. App. 1a-7a. The court noted that the parties had focused their arguments on *Maclin* v. *Freake*, *supra*, which set forth a list of five factors to be considered in determining whether to grant an indigent litigant's request for counsel under Section 1915(d). Pet. App. 4a-5a. The court concluded, however, that the factors set forth in *Maclin* "collapse upon inspection." *Id.* at 4a. Instead, the court held that the necessary inquiry is simpler than *Maclin*'s multi-factoral approach implies: "given the difficulty of the case, did the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel have made a difference in the outcome?" *Id.* at 5a. The court of appeals observed that the resemblance of this test to the "performance and prejudice" standard of *Strickland* v. *Washington*, 466 U.S. 668 (1984), "is not an accident," because "[i]n effect, a prisoner who argues that a lawyer should have been requested to represent him is arguing that he could not represent himself effectively." Pet. App. 5a. The court also noted that, while *Maclin* has been cited approvingly by some courts, "most courts prefer a simpler formulation." Pet. App. 5a, citing *Terrell* v. *Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991); *Whisenant* v. *Yuam*, 739 F.2d 160, 163 (4th Cir. 1984); and *Branch* v. *Cole*, 686 F.2d 264, 266 (5th Cir. 1982) (per curiam).

In reviewing the district court's denial of petitioner's request for appointment of counsel in this

case,[1] the court of appeals concluded that the district court had acted reasonably. Pet. App. 5a-7a. The court noted that petitioner's motion for counsel was filed more than three years after the litigation began, during which time petitioner had already prosecuted a successful appeal. *Id.* at 6a. Moreover, the trial "promised to be a straightforward swearing contest, the only issue being whether [petitioner] had or had not requested treatment." *Ibid.*

The court found unpersuasive petitioner's claim that appointed counsel was necessary in order to

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[1] The opinion of the court of appeals is not entirely clear regarding the distinction between (1) the test that a *district court* should use, *prior to trial*, in considering an indigent plaintiff's request for counsel, and (2) the test that the *court of appeals* will itself use *after trial* in reviewing a district court's denial of a request for counsel. Properly read, the opinion assigns to the district court the task of deciding whether the plaintiff appears competent to try the case himself in view of its expected difficulty. Once the district court has made this predictive decision, the court of appeals will review it as a matter confided to the "district judge's discretion," which the court of appeals will "override only in that extreme case in which it should have been plain beyond doubt before the trial began that the difficulty of the issues relative to the capabilities of the litigant would make it impossible for him to obtain any sort of justice without the aid of a lawyer." Pet. App. 7a. The court of appeals' decision in this case thus both simplifies the district court's required pre-trial inquiry (replacing the *Maclin* "multifactoral approach" (*id.* at 5a) with "our stripped down alternative" (*ibid.*)) while applying an extremely deferential standard of appellate review to such pre-trial decisions. With regard to the limited scope of appellate review, the court specifically observed that "[i]f the [trial court's] judgment was sensible when made, the fact that after the trial it is apparent that the plaintiff was not competent to try the case after all will not establish error." *Id.* at 5a-6a.

permit her to obtain a more qualified expert witness. The court reasoned that such an expert "would have been relevant only to the assessment of damages," an issue that was irrelevant in light of the jury's finding on liability. Pet. App. 6a. Moreover, while petitioner may have desired to use such an expert to demonstrate that she was entitled to treatment for her medical condition, petitioner had no need to litigate that issue because respondents had conceded that she was entitled to treatment. *Ibid.* The court of appeals also noted that petitioner is an experienced litigator who has demonstrated intelligence through her "history of fraud" and her "shrewd cross-examination * * * of one of the defendants on the issue of forgery, bringing out all the contradictions and implausibilities in that defendant's testimony." Pet. App. 7a.

ARGUMENT

1. Petitioner contends (Pet. 5) that the court of appeals has "abandoned the universally accepted" test articulated in *Maclin* in favor of a "cause and prejudice" standard for guiding trial court determinations of whether to grant requests for appointed counsel under Section 1915(d).[2] The formulation adopted for

[2] Petitioner characterizes the court of appeals' test as requiring a showing of "cause and prejudice" before counsel will be appointed under Section 1915(d). This characterization is inaccurate. The court of appeals' test is, in fact, analytically distinct from the "cause and prejudice" standard applied in the habeas corpus context. See, *e.g.*, *McCleskey* v. *Zant*, 111 S. Ct. 1454 (1991); *Coleman* v. *Thompson*, 111 S. Ct. 2546 (1991); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). In the habeas corpus context, "cause" refers to the requirement that a habeas petitioner show some justification for his failure to comply with the particular procedural rule that is being urged as a bar to his claim. That requirement has no analog in this case. Rather, as

district court use in this case, however, is fully consistent with *Maclin* and is nothing more than a simplified restatement of the *Maclin* approach. Pet. App. 5a.

Maclin set forth a list of factors that should generally be considered by district courts presented with a request for appointment of counsel under Section 1915(d). Those factors were: (1) the merits of the indigent litigant's case; (2) the indigent litigant's ability to investigate crucial facts; (3) the complexity of the factual issues and the need for cross-examination by an attorney; (4) the indigent litigant's ability to present the case; and (5) the complexity of the legal issues. 650 F.2d at 887-889.

As the court of appeals observed (Pet. App. 4a-5a), there is substantial overlap among the various *Maclin* factors. Accordingly, the court here articulated a simpler, more straightforward formulation: "given the difficulty of the case, did the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel have made a difference in the outcome?" Pet. App. 5a. While that formulation uses language different from that used in *Maclin*, it does not amount to a meaningfully different legal standard; all of the factors set forth in *Maclin* are relevant to, and thus subsumed in, the test formulated by the court of appeals.

That the court of appeals' test does not conflict with *Maclin* is demonstrated by the fact that, in

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the court of appeals observed, its approach here resembles "the *performance* and prejudice standard of *Strickland* v. *Washington*, 466 U.S. 668 (1984), which governs the issue of ineffective assistance of counsel in criminal cases." Pet. App. 5a (emphasis added).

considering whether the district court had abused its discretion, the court of appeals examined essentially the same factors that *Maclin* identified as relevant to a Section 1915(d) inquiry. Thus, the court considered whether petitioner's ability to present necessary evidence (specifically, expert testimony) had been affected by the absence of appointed counsel; whether the case was factually or legally complex; whether petitioner had the ability to conduct effective cross-examination; and whether petitioner possessed the ability to present her case adequately. Pet. App. 6a-7a. Petitioner points to no respect in which adherence to *Maclin*'s verbal formulation would have resulted in a different level or scope of appellate review in this case, and thus there is no conflict.

2. For the same reasons, petitioner also errs in contending (Pet. 6, 8) that the court of appeals' decision creates a conflict with other circuits that have adopted some version of the *Maclin* test. As noted above, the court of appeals' test in fact subsumes the *Maclin* factors, and thus is entirely consistent with those cases adopting the *Maclin* approach.

3. As the court of appeals observed (Pet. 5a), its test is also fully consistent with those circuits that ask trial courts to apply an "exceptional circumstances" standard to requests for appointment of counsel under Section 1915(d). Under that standard, the existence of "exceptional circumstances" is determined by "an evaluation of both 'the likelihood of success on the merits and the ability of the [indigent litigant] to articulate his claims *pro se* in light of the complexity of the legal issues involved.'" *Terrell* v. *Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991); see also *Branch* v. *Cole*, 686 F.2d 264, 266 (5th Cir. 1982);

Whisenant v. *Yuam*, 739 F.2d 160, 163 (4th Cir. 1984). The approach followed by the court below likewise asks whether, "given the difficulty of the case, * * * the plaintiff appear[s] to be competent to try [the case] himself and, if not, would the presence of counsel have made a difference in the outcome?" Pet. App. 5a. Petitioner can point to no meaningful difference between those two standards, each of which looks to the difficulty and merits of the case and the ability of the indigent litigant.[3] Accordingly, there is no conflict among the circuits on the legal issue presented in this case, and further review is not warranted.[4]

[3] Indeed, petitioner concedes (Pet. 8-9 n.8) that the "exceptional circumstances" test is the substantive equivalent of the approach suggested in *Maclin*.

[4] This Court recently granted a petition for a writ of certiorari filed by petitioner in another case, *Farmer* v. *Brennan*, cert. granted, No. 92-7247 (Oct. 4, 1993). There is no reason to hold the petition in this case pending resolution of that case, which involves the unrelated question of the proper standard for determining whether prison officials have been deliberately indifferent to the safety of prisoners in violation of the Eighth Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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